**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**



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Ref: 8ARD-PM

Carissa Money

Colorado Department of Public Health and Environment

4300 Cherry Creek Drive South, APCD-SS-B1

Denver, Colorado 80246-1530

Re: EPA Comments on Suncor Energy, Inc. Plant 1 and Plant 3 Title V Operating Permit

Dear Ms. Money:

This letter is in response to the Colorado Department of Public Health and Environment’s (CDPHE) public notice of the draft renewal of the title V permit for the Suncor Energy, Inc., Plant 1 and Plant 3 Refinery. CDPHE’s public comment period for this permit lasts from May 9 to July 8, 2022. In addition, there are three public hearings scheduled for this action: one on July 9, 2022, and two on July 13, 2022. CDPHE has stated that it will accept written comments until the close of the final hearing on July 13.

After reviewing the draft title V permit action, the EPA submits the comments below. These comments cover technical concerns related to aggregation of permit actions, and also address environmental justice issues, including the Disparate Impacts Analysis conducted for the permit renewal.

**Technical Comments**

We have technical concerns regarding the separation of four similar source-requested modifications to the Plant 1 and Plant 3 portions of the facility that have resulted in modifications to the title V operating permit since it was last revised on February 22, 2018. Section III of the Technical Review Document (TRD) discusses all of these source-requested modifications.

These modifications were intended to bring the facility into compliance with 40 CFR Part 63 Subpart CC – Refinery MACT (MACT CC). The modifications include the September 12, 2017 minor modification to upgrade the Plant 3 flare; the February 6, 2018 and September 12 and November 1, 2019 minor modifications to upgrade the gasoline benzene reduction unit flare; the March 6, 2018 modification to upgrade the Plant 1 flare; and the June 14, 2018 minor modification to replace the Plant 1 rail rack flare with a vapor combustion unit.

We also have concerns over two other projects completed over the same period at the part of the Suncor facility covered by the Plant 2 title V permit. These include the July 10, 2017 minor modification to upgrade the Plant 2 flare, and the January 30, 2019 minor modification to the Plant 2 rail rack flare.[[1]](#footnote-2)

These projects required that Suncor obtain a New Source Review (NSR) permit from CDPHE before beginning construction on the proposed modifications. According to the TRD, each of these actions was requested and permitted separately under the combined NSR/title V minor modification permitting process.

On January 15, 2009, the EPA published a final action that described the principles of “project aggregation” that we would apply when determining whether a source unreasonably segregated a single project into multiple projects, thereby circumventing NSR permitting requirements.[[2]](#footnote-3) These principles should be used when a source is undergoing multiple changes at its facility, to ensure that the “project” is appropriately defined and that the emission increase attributable to the project is accurately quantified for purposes of analyzing NSR applicability.

The 2009 NSR Aggregation Action called for sources and reviewing authorities to aggregate emissions from nominally separate activities when those activities are “substantially related,” because those activities would be considered a single modification resulting in a significant emissions increase under NSR at Step 1. This “substantially related” criterion is based on an interpretation of the term “project” in the major NSR regulations. The 2009 NSR Aggregation Action also included a statement that the EPA would, as a matter of policy, establish a rebuttable presumption that activities that occur more than three years apart are not “substantially related” and therefore, generally, should not be aggregated for purposes of determining whether they are a single modification at Step 1. The effective date of the 2009 NSR Aggregation Action was stayed pending a legal challenge and reconsideration process, but the action was ultimately affirmed through a 2018 final reconsideration action that lifted the stay.[[3]](#footnote-4)

In summarizing what it means for projects to be substantially related, the 2009 NSR Aggregation Action stated:

[I]n most cases, activities occurring in unrelated portions of a major stationary source (e.g., a plant that makes two separate products and has no equipment shared among the two processing lines) will not be substantially related. The test of a substantial relationship centers around the interrelationship and interdependence of the activities, such that substantially related activities are likely to be jointly planned (i.e., part of the same capital improvement project or engineering study) and occur close in time and at components that are functionally interconnected.[[4]](#footnote-5)

The 2009 NSR Aggregation Action added, “[t]o be ‘substantially related,’ there should be an apparent interconnection – either technically or economically – between the physical and/or operational changes, or a complementary relationship whereby a change at a plant may exist and operate independently, however its benefit is significantly reduced without the other activity. We note that these factors are not necessarily determinative of a substantial relationship but are merely indicators that may suggest that two or more activities are likely to be substantially related and, therefore, candidates for aggregation.”[[5]](#footnote-6)

CDPHE’s analysis of the projects related to the Suncor refinery’s coming into compliance with MACT CC focuses on the technological and economic dependence aspects of the project, but does not describe the interrelationship and apparent interconnection of these projects. The fact that all of these projects had a joint purpose – i.e., to bring the facility into compliance with MACT CC – may weigh in favor of a finding that some or all of the projects are substantially related. We note that the record for the EPA’s 2018 reconsideration action, which affirmed the “substantially related” test, cited an EPA letter issued in 2007 concerning changes that United Refining made to its facility in order to comply with a regulatory requirement for producing Ultra Low Sulfur Gas.[[6]](#footnote-7) While this EPA letter was issued before the 2009 NSR Aggregation Action, the EPA stated[[7]](#footnote-8) that the letter nonetheless supports the concept of an aggregation analysis based on a “substantially related” criterion. The letter does not reach the conclusion that the United Refining projects must be aggregated on the basis of the projects’ combined purpose of regulatory compliance, but it does direct the permitting authority and facility to conduct an analysis of recent projects, and, when conducting that analysis, to consider the entire scope of the project, versus separate pieces of the project.

The EPA requests that CDPHE examine the above-mentioned projects that occurred in 2017-2019 in line with the 2009 NSR Aggregation Action and the EPA’s 2018 reconsideration action for the United Refining Permit to determine if any of them are substantially related and provide documentation of its analysis in the response to comments. The EPA also requests that if CDPHE determines that some or all of these nominally separate projects are substantially related and thus should have been aggregated for NSR permitting, CDPHE determine the appropriate emissions increase or decrease related to the project or projects, and whether the appropriate NSR permits were issued at the time. If the appropriate NSR permits were not issued, CDPHE should act under its authority to address the deficiencies.

**Environmental Justice**

The EPA acknowledges and supports the measures described in the draft title V permit action materials that are intended to advance environmental justice and facilitate meaningful public involvement. These include requiring Suncor to disseminate continuous emissions monitoring data to the public via a web-based system, to submit an annual emissions report detailing total actual emissions from the facility and the amount of emissions that occurred as a result of exceedances of any permit limit, and to submit a quarterly community compliance report that will identify in an easily understood format any emissions violations at the facility during the previous quarter. The EPA also supports CDPHE’s decision to proactively hold three public hearings on the draft title V permit in a manner intended to provide opportunities for meaningful public engagement. The EPA may have additional comments or recommendations related to environmental justice and equity after reviewing the public comments submitted to CDPHE, the transcripts of the hearings, and any other public input.

The EPA incorporates into our comments on this permit action the recommendations in Enclosure B of the EPA’s March 25, 2022 letter to CDPHE regarding the Suncor Plant 2 permit. In particular, the EPA reiterates its recommendation that CDPHE, in conjunction with stakeholders, expedite the comprehensive air emissions analysis, and ensure that the analysis includes the preparation of a cumulative air impacts assessment and identification of specific actions that can be taken to mitigate such impacts. The EPA recommends that the analysis include cumulative air impacts associated with emissions from all emission units at the Suncor facility, fugitive emissions from the facility, emissions from nearby industrial facilities, and transportation, to provide a more complete assessment of the cumulative ambient air impacts of the facility on this community. Consistent with the state’s environmental justice policies and its acknowledgement that the Commerce City/North Denver area is impacted by multiple sources of pollution, including Suncor, that cumulatively impact air, water, and soil, the EPA recommends that the analysis addresses potential impacts from all major pathways of exposure, so as to more fully understand the direct link between the environmental burdens in this community and the health of its residents – and to work with the communities and other stakeholders to develop strategies to mitigate these burdens.

CDPHE’s Notice Of A Proposed Renewal Title V Operating Permit Warranting Public Comment document includes the following statements about changes (including increases) in permitted emissions:

The overall change in permitted emissions associates with these modifications are as follows: PM/PM10/PM2.5: 2.02 tpy (increase), SO2: -0.03 tpy (decrease), NOx: 3.43 tpy (increase), VOC: 16.16 tpy (increase) and CO: 68.71 tpy (increase). There was no change in permitted HCN emissions.

On the other hand, the Disparate Impacts Analysis includes the following statements regarding changes to emissions resulting from the permit action:

The Title V permitting renewal action does not authorize any additional pollutant burden to be added to the area where the Suncor refinery is located. In fact, it includes many requirements that will reduce emissions.

The statements in these two documents appear to be in conflict with each other, and the EPA recommends that they be reconciled and clarified in both documents.

In addition, the technical comments raised above in relation to the multiple projects associated with bringing the Suncor refinery into regulatory compliance with MACT CC have potential EJ implications. If CDPHE determines that the above-mentioned projects should have been aggregated, in whole or in part, and if major nonattainment NSR permitting is triggered as a result, the remedy will also potentially require additional controls and obtaining offsets to mitigate increases of criteria pollutants. There is also the potential for requiring additional notice and comment to the public related to NSR permitting requirements, as well as changes to the draft title V permit.

**Disparate Impact Analysis**

The EPA appreciates that CDPHE prepared a Disparate Impact Analysis as part of its review of Suncor Plants 1 & 3’s title V air pollution permit renewal intended to ensure compliance with Title VI of the Civil Rights Act of 1964. The EPA reviewed the Suncor Disparate Impact Analysis and has some concerns and feedback regarding the analysis. Most significantly, CDPHE acknowledged that its analysis did not include an assessment of how Suncor’s emissions allowed under the permit may cause or contribute to identified existing disparities in the distribution of adverse impacts.[[8]](#footnote-9)

The analysis conducted by CDPHE determined that “Suncor is located in a disproportionately impacted community under the definition in the Colorado Environmental Justice Act, C.R.S. 24-43-109(2)(b)(ii), because more than 40% of the population (49.27%) identify as people of color…and the census block group where Suncor is located ranks in the 80th percentile for people of color…”[[9]](#footnote-10) Based on this screening and additional analysis of environmental and other socioeconomic factors, including indicators of susceptibility to environmental exposures and climate impacts related to health, CDPHE concluded that there was a possibility of disparate impacts on the basis of race, color or national origin occurring, unless such adverse impacts of the permitting action are appropriately mitigated.[[10]](#footnote-11)

A disparate impact analysis of a permitting decision includes not only an assessment of whether any impacts will fall disproportionately on the basis of race, color, or national origin – that is, here, the analysis of the characteristics of the affected population compared to the relevant counties or state – but also an assessment of whether the permit will have adverse impacts. [[11]](#footnote-12) Instead of analyzing adverse impacts, however, the Disparate Impact Analysis makes the conclusory statement that “it is unlikely that additional adverse impacts to the community surrounding the Suncor facility will occur” because the permitting renewal action does not authorize any additional pollutant burden and includes requirements that will reduce emissions. [[12]](#footnote-13) CDPHE does not adequately explain or support the conclusion that the permit will reduce emissions. The EPA recommends an analysis of the potential adverse impacts of the permitting action.

If CDPHE’s analysis concludes that adverse, disparate impacts will result from this permit action, CDPHE should assess whether this action is demonstrably related to a significant, legitimate goal related to CDPHE’s mission, and, if so, whether there is a less discriminatory alternative that will be comparably effective.[[13]](#footnote-14)

The EPA’s External Civil Rights Compliance Office is available to discuss this feedback further and to provide technical assistance to CDPHE and looks forward to collaborating with CDPHE during its compliance review.

**Conclusion**

We are committed to working with CDPHE to ensure that the final title V permit is consistent with all applicable title V permitting requirements and the EPA-approved Colorado title V Air Permitting Program. The EPA plans to review any public comments received and may provide additional comment during the EPA 45-day review period.

If you have questions or wish to discuss this further, please contact me, or your staff can contact Donald Law of my staff at (303) 312-7015 or at law.donald@epa.gov. Thank you for your cooperation.

Sincerely,



Monica Morales

Acting Director

Air and Radiation Division

cc: Michael Ogletree, CDPHE – APCD

1. Although the Suncor facility has two title V permits – one covering Plant 1 and Plant 3, and another covering Plant 2 – the facility as a whole (i.e., inclusive of Plants 1, 2, and 3) is viewed as a single major stationary source under NSR and title V. [↑](#footnote-ref-2)
2. 74 FR 2376 (Jan. 15, 2009) (“2009 NSR Aggregation Action”). [↑](#footnote-ref-3)
3. 83 FR 57324 (Nov. 15, 2018). [↑](#footnote-ref-4)
4. 74 FR at 2378. [↑](#footnote-ref-5)
5. 74 FR at 2378. [↑](#footnote-ref-6)
6. 72 FR 19567, 19571 n.9 (Apr. 15, 2010) (Docket number EPA-HQ-OAR-2003-0064-0126), citing Letter from David J. Campbell, Chief, Permits and Technical Assessment Branch, EPA Region 3 to Matthew Williams, Pennsylvania Department of Environmental Protection (PDEP) Regarding United Refinery Ultra Low Sulfur Gas Project; Proposed Plan Approval (Feb. 21, 2007). [↑](#footnote-ref-7)
7. Response to Public Comments on Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Reconsideration EPA-HQ-OAR-2003-0064 at Page 33. [↑](#footnote-ref-8)
8. Suncor DIA at Page 14. [↑](#footnote-ref-9)
9. Suncor DIA at Page 3. [↑](#footnote-ref-10)
10. Suncor DIA at Page 13. [↑](#footnote-ref-11)
11. See ECRCO Toolkit, at 14-15, <https://www.epa.gov/sites/default/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf> (providing example of a disparate impact analysis in a permit renewal context). [↑](#footnote-ref-12)
12. Suncor DIA at 14. [↑](#footnote-ref-13)
13. See ECRCO Toolkit, at 9-11, <https://www.epa.gov/sites/default/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf> (explaining analytical framework for disparate impact analysis). [↑](#footnote-ref-14)